In The

SUPREME COURT OF THE UNITED STATES

No. ----------

EDITH HARRISON EPP, SECURED CREDITOR, PETITIONER,

V.

ROBERT F. BICKNELL, DEBTOR, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Opinion Below.

The opinion of the court below, not yet reported, is found on pages 62 to 69, inclusive, of transcript of record in this cause, certified to on November 30, 1943, by E. E. Koch, clerk of the United States Circuit Court of Appeals, Eighth Circuit, herewith submitted. The judgment of the said court complained of was entered on November 12, 1943.

Jurisdiction of Court.

The jurisdiction of this court is invoked under Section 347 (a) of the Judicial Code as amended (28 U. S. C. A. 347).

Statement of Case.

A short statement of the case follows (Opinion, U. S. Circuit Court of Appeals, Trans. pp. 62-65):

On July 12, 1937, the respondent, Robert F. Bicknell, and one Charles W. Peek, his brother-in-law, being indebted to one Annie Bell in the sum of $9,000 for the purchase price of a farm, in which Bicknell and Peek each owned an undivided one-half interest, made and delivered to her their certain promissory note in that amount, and to secure payment of the same executed and delivered to her their certain mortgage deed wherein they conveyed to her said farm. In due course said note and mortgage were assigned to Edith Harrison Epp, the petitioner herein.

Thereafter, the indebtedness being in default, a suit to foreclose the mortgage was brought in the state court and, on June 24, 1940, a decree of foreclosure was entered, the court finding that there was due Epp, mortgagee, the sum of $10,008.29, with interest. On the same day Peek and Bicknell obtained a nine months' stay of execution. On May 5, 1941, the farm was sold at sheriff's sale to Epp for $9,600. On May 21, 1941, prior to but upon the eve of the confirmation of the sale, Peek, then a merchant, for the consideration of one dollar, conveyed his undivided one-half interest in the farm to Bicknell, the respondent herein. The transfer of Peek's interest to Bicknell was made in the office of Bicknell's attorney, and upon his suggestion, and in contemplation of Bicknell filing a farmer-debtor petition for relief under Subsections (a) to (r) of Section 75 of the Bankruptcy Act. Two days later Bicknell filed such a petition. Bicknell, on November 10, 1941, amended his petition asking for relief under Subsection (s). In the schedules attached to the first and the amended petitions, Bicknell listed the farm in question as property belonging to him.

Epp, a secured creditor by virtue of said mortgage, filed a motion in the bankruptcy court for an order to strike from the schedules of Bicknell, debtor, the undivided one-half interest in the land conveyed to him by Peek, or in the alternative to require that the schedules be amended to show that Bicknell was only the owner of an undivided one-half interest in the land. An order overruling this motion was entered. Upon appeal this order of the bankruptcy court was affirmed.

Specification of Errors.

It is respectfully suggested that the Circuit Court of Appeals, Eighth Circuit, erred:

1. In holding that the undivided one-half interest in the land in question conveyed by Peek to Robert F. Bicknell, debtor, for a nominal consideration, contemporaneous with and in contemplation of filing of petition for relief under Subsections (a) to (r) of Section 75 of the Bankruptcy Act, was lawfully brought into the jurisdiction of the bankruptcy court, notwithstanding the intent and effect of the transaction was to hinder, delay or defraud the respondent as a secured creditor of Peek.

2. In overruling in effect the decisions of the Supreme Court of Nebraska as to what constitutes a fraudulent conveyance and the effect thereof.

3. In holding that prior to the execution of Peek's deed, Bicknell, because he was a co-tenant of Peek, had an absolute right to redeem the entire tract from the mortgage indebtedness, and that, therefore, the acquisition by Bicknell of Peek's title was not fraudulent.

4. In holding that the case at bar is controlled in part by the decision of this court in *Mangus, et al.* v. *Miller*, 317 U. S. 178.

5. In failing to hold that the case at bar is not controlled by the following decisions, namely, *Shapiro* v. *Wilgus*, 287 U. S. 348; *Hill* v. *Topeka Morris Plan Co.*, (C. C. A.) 105 Fed. (2d) 299; *In re Brown*, (C. C. A.) 118 Fed. (2d) 871; *In re Collins*, (C. C. A.) 75 Fed. (2d) 62.

6. In affirming the judgment of the District Court of the United States for the District of Nebraska in this matter.

ARGUMENT.

I. Specification of Errors Nos. 1 and 2.

Under the laws of Nebraska, every conveyance of any estate or interest in lands made with the intent to hinder, delay or defraud creditors or other persons of their lawful rights, debts or demands, and every such conveyance made or created with intent to defraud a prior purchaser for a valuable consideration, is void.

Section 36-401, Compiled Statutes of Nebraska for 1929, reads in part as follows:

> "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands * * * made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands * * * shall be void."

Section 36-101, Compiled Statutes of Nebraska for 1929, reads in part as follows:

> "Every conveyance of, or charge upon, any estate or interest in lands, or the rents and profits thereof, made or created with intent to defraud prior or subsequent purchasers for a valuable consideration, shall, as against such purchasers, be void."

In *McBride* v. *Helmricks,* 2 N. W. (2d) 118, 140 Neb. 843, the Supreme Court of Nebraska said:

> "The law will not permit one man to assist another in defrauding a third person where it appears that they were actuated by motives denounced by the statute (Comp. Stat. 1929, secs. 36-401, 36-405, 36-406). It having been determined that the grantee in the deed had full knowledge of the fraud before any of the consideration actually moved to the grantor, the deed will be set aside and the property subjected to the rights of the judgment creditor."

In *Lincoln Trust Co.* v. *Sweeney,* 124 Neb. 686, 248 N. W. 67, the Supreme Court of Nebraska said:

> "The deed from father to son in fact delayed plaintiff in the collection of its judgment for $31,600, because it was effective to prevent the sale of the 800-acre farm on execution. The proper deduction from the evidence is that the father intended the natural and obvious result of his own act in deeding the farm to his son - the delay of plaintiff in collecting the debt which had been reduced to judgment. There is nothing in the defense to overcome this inference. As to an existing creditor, a conveyance with such an intent is declared by statute to be void. Comp. Stat. 1929, sec. 36-401."

In *McBride* v. *Helmricks,* supra, the court said:

> "A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction by a preponderance of the evidence."

In *Farmers State Bank of Ewing* v. *Dierks*, 137 Neb. 442, 289 N. W. 860, Chief Justice Simmons, referring to a challenged conveyance as being in fraud of creditors, said:

> "The testimony shows that the conveyance was to withdraw the land from the reach of unsecured creditors, to preserve the land from secured creditors, and to preserve an admitted equity therein for the son, if not for the father and son * * *. It is obvious that the conveyance to the son has not only delayed, but, if permitted to stand, has the effect of entirely preventing the plaintiff from the collection of its judgment by execution at law. Such is its natural and obvious result. The proper conclusion is that the father and son intended that such a result would follow from the conveyance. The law wraps a presumption of fraud around a transaction of this character. The defendants have failed to overcome and remove that presumption. It follows that the conveyance, as against the plaintiff, is void * * *."

A brother-in-law comes within the recognized and well settled meaning of the word "relative." *Lincoln Savings & Loan Association* v. *Mann*, 129 Neb. 26, 260 N. W. 519.

It is not necessary to prove specific intent to defraud; "a grantor is conclusively presumed to intend the obvious and probable consequences of his voluntary acts, and where such acts result in preventing existing creditors from satisfying their claims out of his property, it is an actual fraud upon them, which he is conclusively presumed to have intended." *Peterson* v. *Wahlquist*, 125 Neb. 247, 249 N. W. 678; *Farmers State Bank of Ewing* v. *Dierks*, supra.

In a contest between a vendee and a creditor of the vendor, the adequacy of the consideration may be inquired into. *Farmers State Bank of Ewing* v. *Dierks*, supra. "A conveyance of real estate, whether founded on a valuable consideration or not, if entered into by the parties for the purpose of hindering or delaying a creditor, is void as to such creditor." *McBride* v. *Helmricks*, supra; 27 C. J. 416.

A conveyance for the purpose, known to the grantee, of hindering or delaying a creditor is void, even though the grantor was solvent at the time of making it. *Lincoln Trust Co.* v. *Sweeney*, supra; 27 C. J. 497.

By the term "hinder and delay" is meant, among other things, the doing of something which creates an obstacle in the collection of the debt, the putting of property by the debtor out of his hands so that it cannot be reached by the ordinary process of law. The act done by the debtor may or may not defraud the creditor in fact, and yet be fraudulent in law, because it hinders and delays the creditor in the collection of his debt. *Frank* v. *Minsterketter*, (Ky.) 99 S. W. 219, 220; *Hertzmark* v. *Lynch*, 54 Fed. (2d) 38, 40.

II. Specification of Error No. 3.

In Nebraska and generally, co-tenants have separate and independent freeholds, and when not equitable under the circumstances and the mortgagee dissents, a co-tenant does not possess an absolute right to redeem the entire property held in co-tenancy from the entire lien, particularly if he is a grantee of the mortgagor under a fraudulent conveyance.

This petitioner denies that a tenant in common has any special legal rights which make inoperative the law against fraudulent conveyances. In Nebraska, co-tenants have separate and independent freeholds which they may manage and dispose of as freely as if the estate was one in severalty. A co-tenant may bind his own interest in the common property by mortgage. *The Federal Land Bank of Omaha* v. *Tuma*, 116 Neb. 99, 216 N. W. 186. A co-tenant may maintain an action for partition. *Windle* v. *Kelly*, 135 Neb. 143, 280 N. W. 445. In the case of *In re Williams*, 48 Fed. Supp. 176, the court held that the debtor, who was the owner of an undivided eight-ninths interest in the land in question, was entitled to a stay order postponing foreclosure proceedings as to his interest and that the owner of the undivided one-ninth interest was not a necessary party to the proceeding.

The holding that Bicknell, prior to the conveyance, as a tenant in common had an absolute right to redeem the entire real estate from the entire mortgage lien thereon is not a correct statement of the rule in Nebraska. A tenant in common has this right *provided the mortgagee consents*. A mortgagee, if contrary to his interest, cannot be compelled to accept from a tenant in common redemption of more than that tenant's interest. Thus, in *Dougherty* v. *Kubat*, 67 Neb. 269, 93 N. W. 317, the Supreme Court of Nebraska said (syllabus by court):

> "As the rule that the debt is a unit, so that redemption of a partial interest only cannot be imposed upon the mortgagee, is solely for the benefit and convenience of the latter, if he chooses to accept a portion of the debt, and allow redemption of a partial interest, and such course is equitable under the circumstances, the holders of such partial interest cannot insist upon redeeming the whole."

The opinion in this case was by Commissioner Pound, later Dean of the Harvard Law School. The rule expressed is still the law in Nebraska and generally. Citing this case as authority, 42 C. J. 362, Sec. 2100, reads as follows:

> "As a general rule a tenant in common of the mortgaged premises may redeem the entire property from the mortgage * * *. However, where, after the execution of the mortgage, a separate parcel of the mortgaged premises has been conveyed, the transferee is not entitled to redeem all of the mortgaged premises without the consent of the mortgagee, particularly where it would be inequitable to allow him to do so, *and there is a like holding with reference to a redemption by a tenant in common.*"

Redemption by a tenant in common of the entire property from the entire debt may perhaps be compelled by the mortgagee. But, if he sees fit, the rule is that, "The mortgagee may consent to the redemption by an owner of an undivided interest in the property of such owner's interest without a redemption of the entire premises." 42 C. J. 351, Sec. 2077. Nor can a mortgagee be compelled to accept redemption from a non-bona fide grantee of mortgagor where thereby mortgagee's rights would be impaired.

42 C. J. 360, Sec. 2094, reads as follows:

> "A person claiming the right to redeem as grantee of the mortgagor must be a purchaser in good faith * * *."

III. Specification of Error No. 4.

The suggestion by Mr. Chief Justice Stone in *Mangus, et al.* v. *Miller*, supra, as to transfer of interests between

co-tenants, is not applicable to the case at bar. In that case no secured creditor of the grantor objected and it was not charged that the conveyance was fraudulent.

IV. Specification of Error No. 5.

The decision of the Circuit Court of Appeals in this matter ignores or fails to give weight to the decisions in *Shapiro* v. *Wilgus,* supra; *Hill* v. *Topeka Morris Plan Co.,* supra; *In re Brown,* supra, and *In re Collins,* supra.

In *Shapiro* v. *Wilgus,* Mr. Justice Cardozo, in denouncing a conveyance as illegal when made with intent to hinder and delay creditors, said in part:

> "The sole purpose of the conveyance was to divest the debtor of his title and put it in such a form and place that levies would be averted * * *. A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them * * *. The conveyance to the corporation being voidable because fraudulent in law, the receivership must share its fate. It was part and parcel of a scheme whereby the form of a judicial remedy was to supply a protective cover for a fraudulent design * * *. The design would have been ineffective if the debtor had been suffered to keep the business for himself * * *. It did not gain validity when he transferred the business to another with a capacity for obstruction believed to be greater than his own * * *. A corporation created three days before the suit for the very purpose of being sued was to be interposed between its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers."

The language of Mr. Justice Cardozo is applicable to the situation at bar. At the time that Peek gave to re-

spondent Bicknell, his co-tenant, a quite claim deed, the land had been sold at foreclosure proceedings to the petitioner and the sale was about to be confirmed. Peek and Bicknell had exhausted their rights to further delays in the state court. Peek was not a farmer but Bicknell was. There was an immediate need for interposing an obstacle between the pursuing creditor and Peek and Bicknell, debtors. So they journeyed to the office of the attorney for respondent, who recommended that "Mr. Bicknell file Frazier-Lempke proceedings" (Tr. p. 32). But that was not sufficient; Peek's undivided interest in the land could still be reached. Counsel for the respondent candidly told the district court what then took place, saying (Tr. pp. 31, 32):

> "In the course of the conversation I discovered that they each owned an undivided one-half interest. I suggested, after they talked about the matter sometime, that Peek deed to Bicknell. And I prepared a deed, - I think it was a quit claim deed, although it may have been a warranty deed, - for the undivided one-half interest. I don't recall whether they took that deed with them, - I rather think they did, - and had Mr. Peek and his wife sign it at Tecumseh and then bring it back to my office, or whether Mrs. Peek came up; but, at any rate, the deed was brought to my office when it was all completed or was in my office when it was all completed. And Mr. Peek was sitting on one side of my desk and Mr. Bicknell on the other, and I told Mr. Peek to hand the deed to Mr. Bicknell, and I told Mr. Bicknell to give Mr. Peek a dollar; and that was done.
>
> "Q. 7. And was that at the time that you prepared for Bicknell the petition that has been filed in this matter?
>
> "A. Well, it was immediately preceding. I don't

remember whether it was a day or two or three days before. It was just a very short time before.

"Q. 8. The two transactions were more or less contemporaneous?

"A. Well, the one transaction contemplated the other. In other words, at the time that I suggested to Peek that he deed to Bicknell I had already told the parties that I recommended that Mr. Bicknell file Frazier-Lemke proceedings, and I know that it was contemplated that when Peek deeded to Bicknell, it was for the purpose of enabling Bicknell to be the owner of the entire interest in the real estate."

Thus was the Peek undivided interest in the land placed in the Frazier-Lempke concentration camp. The foreclosure proceeding was superseded not only as to Bicknell, a farmer, but as to Peek, a merchant. A legal obstruction had been built which it was believed would hold the secured creditor at bay as to both Bicknell and Peek. The transfer was made to Bicknell because being a farmer he had a greater legal capacity for obstruction than Peek.

The petitioner was hindered and delayed in two respects:

1. While the land is in the custody of the bankruptcy court, the petitioner is prevented from getting a sheriff's deed thereto, or from having the sale set aside and the Peek undivided one-half interest sold.

2. While the foreclosure proceeding is pending, the petitioner is estopped from resorting to an action at law against Peek. Section 20-2142, Compiled Statutes of Nebraska for 1929; *Federal Farm Mortgage Corporation* v. *Claussen*, 138 Neb. 518, 293 N. W. 424.

In *Sibbernsen* v. *Peterson,* 115 Neb. 131, 211 N. W. 993, it was held that there may be in a foreclosure case judicial sale of land by undivided halves where the land was owned by tenants in common.

Section 20-2142, Compiled Statutes of Nebraska for 1929, provides as follows:

> "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court."

In construing this section the Supreme Court of Nebraska, in *Federal Farm Mortgage Corporation* v. *Claussen,* supra, said that its purpose was "to protect the debtor and to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose the mortgage."

In *Hill* v. *Topeka Morris Plan Co.,* (C. C. A.) supra, the court said that bankruptcy may not be used as a means to hinder, delay, or defraud creditors and that a petition for composition or extension of debt was properly dismissed where a petitioner scheduled no assets and admitted that one of the purposes of the petition was to prevent garnishment proceedings.

In the case of *In re Brown,* (C. C. A.) supra, the court held that a "Debtor should not list property in which he has no title, interest or right of possession."

In the case of *In re Collins,* supra, the Circuit Court of Appeals, Eighth Circuit, said:

"Where a corporation, to delay its secured creditor, conveyed realty without consideration to sole stockholder, so that latter might immediately file composition and extension proceeding under Bankruptcy Act so as to prevent sale under corporation's trust deed, court which issued ex parte restraining order against the sale should have dissolved such order on application of trustee under trust deed and corporation's secured creditor.

"The plan resulted, to convey this property to an individual who could avail himself of this statute. The purpose of the entire transaction and of every move in it was to hinder and delay a creditor in collecting a just debt then due."

V. Specification of Error No. 6.

The respondent did not come into the bankruptcy court as owner of Peek's interest with clean hands. It was he who suggested the conveyance herein challenged, knowing full well that it would be a breach of Peek's equitable duty to this petitioner and effectively hinder and delay her in the collection of her claim against Peek. Bicknell was as much a party to the fraudulent scheme as Peek.

If it were true, as declared by the Circuit Court of Appeals, that Bicknell as a co-tenant possessed an absolute right to redeem the entire property held in co-tenancy from the entire lien, then Bicknell gained nothing by the Peek conveyance and will lose nothing by having it set aside as fraudulent. On the other hand, if the decision of the Circuit Court of Appeals is reversed and the motion of the petitioner in the district court is sustained, this petitioner will regain her right to enforce her claim against Peek.

Equity can interfere to prevent the consummation of a fraudulent scheme, fraud being peculiarly a matter of its jurisdiction. Since equity does not suffer itself to be circumvented by specious devices, it can and should set aside all transactions founded upon them, by whatever machinery, legal or otherwise, they may have been effected.

Respectfully submitted,

C. A. SORENSEN,
Counsel for Petitioner.